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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALLAN CORRAL HERNANDEZ, Defendant and Appellant.	E060305 (Super.Ct.No. RIF149998) O P I N I O N

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed as modified.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr. and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant Allan Corral Hernandez contends that his sentence of 25 years to life for attempting to prevent or dissuade a crime victim from reporting the victimization to police (Pen. Code, § 136.1, subd. (b)(1))[1] constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. For the reasons discussed below, we reject this argument.

Defendant also argues: (1) the trial court miscalculated his presentence custody credits, (2) the court erroneously increased his restitution and parole revocation fines at his second sentencing hearing, and (3) the abstract of judgment includes errors in the amounts of certain assessments. The Attorney General does not dispute these points. We agree, and will modify the judgment accordingly.

II. FACTUAL SUMMARY

In April 2009, Jane Doe was living in a house with her mother, her children, and a friend, Irene Perez.[2] Defendant, who was dating Doe, was also staying there. He was on parole at the time and had been previously convicted of two prior strike offenses for purposes of the "Three Strikes" law.

On the afternoon of April 5, 2009, defendant and Doe got into an argument. The evidence at trial regarding this argument was in conflict. Doe testified for the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The evidence adduced at trial in this case is found in the record in a prior appeal, our case No. E054160. We take judicial of the record on appeal in that case. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

prosecution as follows. Defendant asked Doe to clean the house so that his friends could come over. Doe was concerned because she knew defendant was involved in the Mexican Mafia and Doe believed his friends were also gang members. They began to argue. The argument turned violent when defendant struck Doe with a large flashlight. The fight continued as they moved from the kitchen to the bedroom and into a bathroom. At some point, defendant said he was going to burn the house down and kill everyone inside.

During the fight, defendant shook Doe, threw her down, slapped her in the head, shoved her against a bathroom wall, and choked her until she blacked out. As he strangled her, he told her: "I'm going to fuckin' kill you." At other points during the fight, defendant told Doe, "If I don't get you, someone of my friends will," and "If you mention my name, I already have someone right now that will take you out." Doe believed that the threats against her life were "real" because she was aware of "how the gangs work."

Defendant got into a car to drive away. Doe reached into the car to pick up her house keys from the passenger-side floorboard. Defendant put the car in reverse, causing the car door to hit Doe. He told Doe that she "better not call the cops or press charges, because . . . he will be in a lot of trouble. And if something happens, then something will be on [Doe] also." He then drove away.

Shortly after defendant drove away, defendant's mother arrived at the house. She asked Doe to not press charges against defendant because "he'll be in a lot of trouble."

Doe testified that when the police arrived, she was scared to talk to them because of defendant's gang connection. She refused to sign a private person arrest form because she "didn't want nothing [to] happen to me or my family."

Doe's mother testified at trial and generally corroborated Doe's testimony regarding the incident. She said defendant threatened to burn the house down and to kill Doe. She heard Doe screaming and saw red marks and bruises on Doe immediately after the fight. She also saw Doe get hit by the car door as defendant started driving away.

During the next three days, defendant called Doe more than 60 times, insisting that she alter her story regarding the domestic violence incident. He demanded that Doe tell the police that Doe was the one who started the fight. Defendant also sent text messages to Doe, telling her he was worried because "he was going to get in . . . a lot of trouble."

Perez testified about the April 5 incident for the defense. She stated Doe and defendant argued about Doe's use of methamphetamine. According to Perez, the argument was verbal only, and Doe did not complain of any injuries or physical violence. When Doe and defendant came out of the bathroom, defendant collected his belongings and went to his car. Doe ran out of the house and, as defendant started to pull away, Doe "jumped in the window of the driver's side and . . . tried to pull the keys out of the ignition." After Doe's son pulled Doe out of the car, defendant left. Perez never heard defendant threaten to kill Doe or burn the house down.

On April 8, 2009, Doe was at her house with Perez and Ernie Fuentes when defendant and another person came to the house. Doe's and Perez's testimony as to what

happened that night was again in conflict. According to Doe, she saw something shiny in defendant's hands and gave inconsistent testimony as to whether the object was a gun. Fuentes met defendant at the front door. Defendant was upset and said he needed to talk to Doe. When he was not allowed inside, he became angry and hit the door. He then moved with his companion to the side of the house. Doe heard "popping" noises, consistent with the sound of gunfire, coming from the side of the house.

Perez described the events differently. She testified that she and Doe were using methamphetamine that night. Fuentes, who Perez knew as "Scooby," was also there. Defendant came to the house, tapped on a window, and asked to see Doe. He had a couple of beers in his hand; he did not have a gun. Doe told Scooby to "go get the guns." Scooby returned with two guns and gave one to Doe. Scooby fired his gun toward defendant.

When police arrived at Doe's home, Doe reported that she thought someone had shot at her home. However, no bullet holes or strike marks were found on Doe's property.

Doe told a police officer that defendant had threatened her to get her to change her story about what happened during the previous incident. She said she was afraid of defendant and "believed he would do anything that it took to make her change her story."

After defendant was arrested later that night, he called Doe three or four times from the "holding" area in the jail. According to Doe, defendant told her "how much trouble he's going to be in" and to "not press any charges or anything." While in custody

awaiting trial, defendant continued to make threats to Doe and to tell her to change her story "to get him off of this."

III. PROCEDURAL BACKGROUND

A jury convicted defendant of battery of a cohabitant (§ 243, subd. (e)(1); count 1), a lesser offense of the charged crime of corporal injury on a cohabitant (§ 273.5); attempting to prevent a crime victim from reporting the victimization to police (§ 136.1, subd. (b)(1); count 3); unlawful possession of a firearm following a felony conviction (§ 12021, subd. (c)(1); count 5);[3] and unlawful possession of ammunition (§ 12316, subd. (b)(1); count 6).[4] The jury hung on a charge of making a criminal threat (§ 422), which the court subsequently dismissed. The jury also acquitted defendant of a charge of maliciously taking down a telephone line. (§ 591; count 4.)

In a bifurcated proceeding, the trial court found true allegations that defendant had a one-year prior prison conviction, two prior serious felony convictions, and two prior strike convictions. (Pen. Code, §§ 667, subds. (a), (e)(2)(A), 667.5, subd. (b), 1170.12, subd. (c)(2)(A).) The prison prior arose from defendant's 2005 conviction for driving under the influence and causing injury (Veh. Code, § 23153, subd. (b)) and his failure to remain free from custody for five years after serving his term.

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[3] Section 12021, subdivision (c)(1) has since been recodified as section 29800.

[4] Section 12316, subdivision (b)(1) has since been recodified as section 30305, subdivision (a)(1).

The prior serious felonies and strike convictions occurred in 1995, and were for voluntary manslaughter (§ 192, subd. (a)) and assault on a police officer (§ 245, subd. (d)(1)). Although these convictions resulted from a single trial, the manslaughter conviction arose from a killing that took place three years before the assault on the police officer. In each incident, defendant personally used a gun.

After the court denied defendant's request to strike his prior strike convictions, a so-called *Romero*[5] motion, defendant was sentenced to 25 years to life on each of counts 3, 5, and 6, plus one year on count 1. The sentences on counts 1 and 5 were to run consecutive to the sentence on count 3; the sentence on count 6 was to run concurrent to the sentence on count 5. He was further sentenced to consecutive terms of 10 years for the two prior serious felony convictions and one year for the prior prison conviction. The total term was 61 years to life.

In 2013, we reversed the convictions on counts 5 and 6 (possession of a firearm and ammunition) because of a prejudicial instructional error. (*People v. Hernandez* (2013) 217 Cal.App.4th 559.) Defendant did not challenge, and we did not address, the convictions on counts 1 or 3 or the sentences for those convictions.

After the matter was remanded to the trial court, the court dismissed counts 5 and 6 and held a new sentencing hearing.

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[5] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Prior to sentencing, defendant made another *Romero* motion to strike his two prior strikes. Defendant also objected to the proposed sentence "on the grounds of cruel and unusual punishment under the Eighth Amendment."

Our record includes evidence of the convictions of the prior strikes, but does not include evidence of the underlying facts in those cases. The People, in their written opposition to the defendant's *Romero* motion, summarize the facts, which the court relied on at the sentencing hearing without objection. According to the People, the first prior strike—a voluntary manslaughter conviction—involved an incident in 1991 in which defendant got into a verbal confrontation with victim Elisa Portillo and others, then got into the passenger seat of a truck; as the driver drove away, defendant fired numerous gunshots in the direction of the people he had confronted, yelling "'I'm Alan Hernandez from Arlanza, don't forget it!'"; one of the gunshots hit Portillo, killing her. The defendant was thereafter "on the run until he was arrested" three years later.

The second strike—for assaulting a police officer—arose from an attempted traffic stop of a vehicle in 1994 in which defendant was in the passenger seat. Instead of stopping, the driver accelerated and ran a red light; as they fled, a gun, a baggie, and other items were thrown from the passenger side of the vehicle; when the vehicle stopped, the occupants fled on foot; a policeman yelled to defendant, "'Stop or I'll Shoot'"; the defendant turned around, drew a gun from his waistband, and faced the officer; the officer kicked defendant, forcing defendant to drop the gun, and arrested him; defendant was in possession of a switchblade and marijuana.

The court rejected defendant's *Romero* motion, but did strike one of the serious felony conviction enhancements. In denying the *Romero* motion, the court observed that California voters recently amended the Three Strikes law to lessen the harshness of its consequences under some circumstances, but not here.[6] The court stated: "[Section] 136.1 of the Penal Code can be violated in a number of ways which cannot seem very serious. It could also be violated in a number of ways that are very serious. And it's not just a crime which has a victim of the witness. It's a crime against the criminal justice system itself, which is, I think, one reason why the Legislature has chosen to make [it], even after the change in legislation, still a crime which triggers the three-strike law. [¶] And when we look at your [i.e., defendant's] history, . . . you have two extremely serious prior offenses back in the early '90s. Although you were sentenced for them at the same time and received a single 19-year sentence, the crimes themselves were three years apart. They are three years apart because you were, in fact, on the run for those three years. And as the People have pointed out in their Points and Authorities, there is simply no track record of you going a significant period of time out in the community without reoffending. That simply hasn't happened."

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[6] The court was apparently referring to the voters' approval of Proposition 36, or the Three Strikes Reform Act of 2012. This act "amended the Three Strikes law so that an indeterminate life sentence may only be imposed where the offender's third strike is a serious and/or violent felony or where the offender is not eligible for a determinate sentence based on other disqualifying factors." (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 596-597.) Because defendant's conviction for violation of section 136.1 was and remained a serious felony for purposes of the Three Strikes law (§§ 1170.12, subd. (b)(1), 1192.7, subd. (c)(37)), it does not appear that the Three Strikes Reform Act of 2012 will benefit him.

The court then sentenced defendant to 25 years to life on count 3, plus five years for the remaining serious felony conviction and one year for the prior prison conviction. The court also sentenced defendant to six months as to count 1 (misdemeanor battery), to be served concurrently in county jail. The total term is 31 years to life.

IV. DISCUSSION

A. *Cruel and Unusual Punishment*

Defendant contends his sentence of 25 years to life for violating section 136.1, subdivision (b)(1) constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution. We reject the argument.

The Eighth Amendment, applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (U.S. Const., 8th Amend.) A punishment is cruel and unusual under the Eighth Amendment if it is "grossly out of proportion to the severity of the crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 72 (*Andrade*).)[7] In making this determination, the "court may not simply look to the nature of the offense in the abstract, but must take into consideration all of the relevant specific circumstances under which the offense actually was committed." (*In re Coley* (2012) 55 Cal.4th 524, 553.)

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[7] California's Constitution also prohibits the infliction of "[c]ruel or unusual punishment" and "excessive fines." (Cal. Const., art. 1, § 17.) The state and federal prohibitions are not coextensive. (*People v. Anderson* (1972) 6 Cal.3d 628, 634.) Defendant relies exclusively upon the federal Constitution and makes no argument that his sentence violates the California Constitution. We limit our discussion accordingly.

The defendant bears a "considerable burden" to show the requisite disproportionality (*People v. Wingo* (1975) 14 Cal.3d 169, 174), and, in a noncapital case, successful proportionality challenges are "exceedingly rare" (*Rummel v. Estelle* (1980) 445 U.S. 263, 272).

The United States Supreme Court addressed Eighth Amendment challenges to California's Three Strikes law in *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*) and *Andrade, supra,* 538 U.S. 63. In *Ewing*, the defendant was sentenced to a term of 25 years to life under the Three Strikes law for stealing three golf clubs priced at $399 each, as a petty theft with a prior conviction for theft. (*Ewing, supra,* 538 U.S. at pp. 18, 20 (plur. opn. of O'Connor, J.).) His criminal history included convictions for theft, grand theft auto, petty theft with a prior, battery, burglary, possessing drug paraphernalia, appropriating lost property, possessing a firearm, and trespassing. (*Id.* at p. 18.) In rejecting the defendant's challenge, Justice O'Connor, writing for a three-Justice plurality, stated: "In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. . . . To give full effect to the State's choice of this legitimate penological goal, our proportionality review of Ewing's sentence must take that goal into account." (*Id.* at p. 29.) The sentence, the plurality concluded, was "not grossly disproportionate and therefore does not violate the Eighth Amendment[] . . . ." (*Id.* at pp. 30-31.) Two justices, Justices Scalia and Thomas, agreed with the

plurality that Ewing's sentence did not violate the Eighth Amendment, but wrote separately to express the view that a proportionality principle cannot be "intelligently appl[ied]." (See *id.* at p. 31 (conc. opn. of Scalia, J.); *id.* at p. 32 (conc. opn. of Thomas, J.).)[8]

In *Andrade*, the petitioner stole five videotapes worth $84.70 from a store and, two weeks later, stole four videotapes worth $68.84 from another store. (*Andrade, supra,* 538 U.S. at p. 66.) He was convicted of two counts of petty theft with a prior conviction under section 666, and sentenced under the Three Strikes law to two consecutive 25-year-to-life terms. (*Id.* at pp. 67-68.) His criminal history consisted of convictions for misdemeanor theft, multiple counts of first-degree residential burglary, two counts of transporting marijuana, and a state parole violation—escape from federal prison. (*Id.* at pp. 66-67.) The California Court of Appeal held that the sentence did not violate the Eighth Amendment. (*Andrade, supra,* at p. 69.) The United States Supreme Court held that the petitioner was not entitled to federal habeas relief because the California Court of Appeal's application of the "gross proportionality principle" was not unreasonable. (*Id.* at p. 77.)

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[8] Although Justice O'Connor's opinion was joined by only two other justices, the requirement of gross disproportionality was accepted by seven justices, including the four dissenters. (See *Ewing, supra,* 538 U.S. at pp. 32-33 (dis. opn. of Bryer, J.).) Moreover, in the companion case to *Ewing, Andrade, supra,* 538 U.S. 63, all nine justices agreed that it is "'clearly established'" under federal law that, in analyzing an Eighth Amendment challenge, a "gross disproportionality principle is applicable to sentences for terms of years." (*Andrade, supra,* at p. 72 (maj. opn. of O'Connor, J.); *id.* at p. 77 (dis. opn. of Souter, J.).)

Turning to the present case, we conclude that defendant's 25-year-to-life sentence for a violation of section 136.1 did not violate the Eighth Amendment. First, we consider not only the crime that triggered the challenged sentence, but his entire criminal history. (See *Ewing*, *supra*, 538 U.S. at p. 29.) Defendant's two prior strike offenses involved violence or the threat of violence and the personal use of a firearm. In the first, defendant fired a gun from a vehicle, killing a woman in 1991. He was 21 years old at that time. He was thereafter, as the trial court put it, "on the lam[]" for three years until he was apprehended when he assaulted a peace officer with a firearm. Fourteen months after his release on parole in 2004, he was convicted of driving under the influence and causing bodily injury, for which he was sentenced to five years in prison. Less than three months after his release on parole in July 2008, he violated parole and was returned to custody. Most recently, he had been out on parole less than six months when he engaged in the crimes we are concerned with in this case. As the trial court observed, defendant has "no track record of . . . going a significant period of time out in the community without reoffending."

Contrary to defendant's effort on appeal to downplay the seriousness of the triggering crime, a violation of section 136.1 is, by legislative fiat, a serious offense for purposes of the Three Strikes Law. (See §§ 1170.12, subd. (b)(1), 1192.7, subd. (c)(37); see also *People v. Neely* (2004) 124 Cal.App.4th 1258, 1268 ["all felony violations of Penal Code section 136.1 are serious felonies within the meaning of" the Three Strikes law].) Moreover, as the trial court observed, the individual who is the subject of the

perpetrator's efforts is not the only victim; it is "a crime against the criminal justice system itself." (See also *People v. Navarro* (2013) 212 Cal.App.4th 1336, 1349, fn. omitted ["California has a strong governmental interest in supporting and protecting citizens who wish to report violations of its criminal laws"].)

We also reject defendant's reliance on the fact that a violation of section 136.1 is a wobbler that could be punished as a misdemeanor. As the Supreme Court stated in *Ewing*, the fact that the conviction of grand theft in that case "is a 'wobbler' under California law is of no moment. Though California courts have discretion to reduce a felony grand theft charge to a misdemeanor, it remains a felony for all purposes 'unless and until the trial court imposes a misdemeanor sentence.' [Citations.]" (*Ewing, supra,* 538 U.S. at pp. 28-29.) Here, defendant's conviction of violating section 136.1 remained a felony.

Defendant also points out that "the jury did not find that the dissuasion was coupled with any threat of bodily injury or death." He is apparently referring to the jury's failure to reach a verdict on the charge of making a criminal threat under section 422. Initially, we observe that even when a jury acquits a defendant of a charged offense, the acquittal "does *not* constitute a finding that the defendant is factually innocent of the offense or establish that any or all of the specific elements of the offense are not true." (*In re Coley, supra,* 55 Cal.4th at p. 554.) The jury's not guilty verdict may mean "only that the jury was of the view that the prosecution had not proved the elements of the charged offense beyond a reasonable doubt." (*Id.* at p. 555.)

More to defendant's point, however, is that even if the jury rejected Doe's testimony regarding the threats to her life, the absence of such threats is not a significant factor in evaluating whether the sentence is cruel and unusual. The triggering offense in *Ewing*, for example, was the theft of golf clubs; and in *Andrade*, the theft of videotapes. And, more recently, in *Coley*, the crime that triggered the defendant's third strike sentence was the failure to update his sex offender status within five working days of his birthday. The defendants' third strike sentences in these cases were upheld notwithstanding the fact that the crimes involved no "threat of bodily injury or death."

Defendant relies heavily on *Banyard v. Duncan* (C.D.Cal. 2004) 342 F.Supp.2d 865. In that case, the petitioner, Banyard, had been sentenced under the Three Strikes Law to 25 years to life for possession of a controlled substance. (*Id.* at p. 868.) As the District Court described the crime: "Banyard possessed rock cocaine weighing a fraction of a gram—just enough to fit beneath his fingernail. The quantity was so small that, had he not been arrested just after purchasing it, the drug would have been entirely consumed within a matter of moments." (*Ibid.*) In concluding that Banyard's sentence was unconstitutional, the court emphasized the fact that his triggering crime was for possessing a single use quantity of cocaine. It explained that "the crime of drug possession occupies a unique place among the nation's criminal laws. The crime of possessing a [single] use quantity of drugs is committed on a regular basis by countless otherwise law-abiding citizens, without any significant feeling of moral culpability. Only those who are actually observed purchasing the drugs or who may be searched for some

other reason need have any significant fear of apprehension or punishment." (*Id.* at p. 875.) Banyard's crime, the court added, "was 'one of the most passive crimes a person can commit'" and "involved no other person and produced no criminal victim." (*Ibid.*, quoting *Solem v. Helm* (1983) 463 U.S. 277, 296.)

In contrast to the passive, victimless crime committed by Banyard, defendant's violation of section 136.1 is not only a serious felony, but had a clear, direct victim—Doe. Even if Doe's testimony regarding the threats on her life are not considered, defendant made numerous calls to Doe to get her to not report the April 5 incident or to change her story about what happened. As the trial court observed, "it was a background fact of this case that [defendant] was a gang member and that [Doe] believed him to be a gang member. And whether or not he did, in fact, say certain words to her in the nature of threats which she had related, she was afraid. She was genuinely afraid . . . ." Clearly, defendant's conduct is far more egregious than Banyard's possession of a single use quantity of cocaine. It is thus easily distinguishable from the present case.

For all the foregoing reasons, we reject defendant's argument that his sentence violates the Eighth Amendment to the United States Constitution.

B. *Calculation of Presentence Custody*

On December 20, 2013, when the trial court resentenced defendant upon remand, it determined defendant was entitled to 783 days of presentence confinement credit and 391 days of presentence custody credit under section 4019, a total of 1,174 days. The

court expressly indicated that its calculation excluded the time defendant had been in prison serving his original sentence.

Defendant contends the court miscalculated defendant's presentence credits and that he is "entitled to years of more credit." The Attorney General agrees with defendant's argument and his calculation of credits.

Under *People v. Buckhalter* (2001) 26 Cal.4th 20, when "an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the 'subsequent sentence.' [Citation.]" (*Id.* at p. 23.) The defendant is entitled to "credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody." (*Id.* at p. 29.) However, credits for presentence good conduct are calculated under section 4019 based only on the time between the arrest and the *original* sentencing hearing. (*People v. Buckhalter*, *supra*, at p. 40.)

Here, defendant's custody began with his arrest on June 15, 2009,[9] and the post-remand sentencing hearing was held on December 20, 2013—a total of 1,650 days. In addition, the number of presentence conduct credits calculated under the applicable

[9] Defendant was taken into custody on April 8, 2009, when the gun was found in the engine compartment of the car he was driving. The parties agree, however, that his date of arrest for purposes of calculating custody credits in this case is June 15, 2009. Defendant's custody between April 8 and June 15 is apparently attributable to his violation of parole, not the charges in this case.

version of section 4019 (see Stats. 1976, ch. 286, § 4, p. 595), based upon the time between his arrest and the original sentencing hearing, is 380. The total is 2,030 days.

C. *Imposition of Restitution Fine and Parole Revocation Fine*

At the original sentencing hearing, the trial court imposed a restitution fine and a parole revocation fine in the amount of $800 each. At the December 20, 2013, sentencing hearing, the court increased those fines to $1,000 each. As defendant contends and the Attorney General concedes, this was error. "[R]estitution fines are punishment for purposes of double jeopardy, and on remand for resentencing after an appeal, a trial court may not impose restitution fines greater than those imposed in the original judgment." (*People v. Daniels* (2012) 208 Cal.App.4th 29, 32, citing *People v. Hanson* (2000) 23 Cal.4th 355, 366-367.) We will modify the judgment and direct the trial court accordingly.

D. *Errors in Abstract of Judgment Regarding Court Operations and Facilities Assessments*

According to the abstract of judgment, defendant must pay statutory court assessments totaling $280. Defendant and the Attorney General agree that the correct total is $140, and that the abstract of judgment should therefore be amended to reflect the correct amount. We agree.

Under Penal Code section 1465.8, subdivision (a), "an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense" to "assist in funding

court operations." In addition, a $30 assessment for court facilities "shall be imposed on every conviction" of a misdemeanor or felony. (Gov. Code, § 70373, subd. (a)(1).)

Here, defendant was convicted of two charges: misdemeanor battery under count 1 (Pen. Code, § 243, subd. (e)), and, under count 3, intimidation of a witness (Pen. Code, § 136.1, subd. (b)). The sum of the $40 per conviction for the court operations assessments (Pen. Code, § 1465.8) and the $30 per conviction court facilities assessments (Gov. Code, § 70373) is $140. We will modify the judgment and direct the trial court accordingly.

V. DISPOSITION

The judgment is modified as follows: (1) defendant shall receive presentence credit of 2,030 days, consisting of 1,650 days of actual presentence custody credit and 380 days of presentence conduct credits; (2) the restitution fine and parole revocation fine are each reduced from $1,000 to $800; and (3) the total of court operations and facilities assessments is $140, consisting of $80 ($40 for each conviction) in assessments pursuant to Penal Code section 1465.8 and $60 ($30 for each conviction) in assessments pursuant to Government Code section 70373. As modified, the judgment is affirmed.

The court is directed to prepare a minute order and amended abstract of judgment to reflect the modifications and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING

Acting P. J.

We concur:

MILLER

J.

CODRINGTON

J.